ISSUE DATE: March 14, 2000

DOCKET NO. P-421/CI-99-786

ORDER AFTER REMAND

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Gregory Scott	Chair
Edward A. Garvey	Commissioner
Joel Jacobs	Commissioner
Marshall Johnson	Commissioner
LeRoy Koppendrayer	Commissioner

In the Matter of the Federal Court Remand of Issues Proceeding from the Interconnection Agreements Between U S WEST Communications, Inc. and AT&T, MCI, MFS, and AT&T Wireless	ISSUE DATE: March 14, 2000 DOCKET NO. P-421/CI-99-786 ORDER AFTER REMAND

PROCEDURAL HISTORY

On March 30, 1999 the United States District Court, District of Minnesota, issued Orders in two appeals from decisions of this Commission resolving interconnection disputes between telecommunications carriers under the federal Telecommunications Act of 1996.[1] Both appeals were brought by U S WEST Communications, Inc. (U S WEST).

One appeal challenged Commission decisions in a consolidated case involving interconnection agreements between U S WEST and AT&T Communications of the Midwest, Inc., MCImetro Access Transmission Services, Inc., and MFS Communications Company, Inc.[2] The other challenged Commission decisions on the interconnection agreement between U S WEST and AT&T Wireless Services, Inc.[3] The Court overturned several decisions in these cases and remanded both cases for further proceedings.

On June 21, 1999 the Commission issued a notice to all parties and potentially interested persons, requesting comments on all but one of the remanded issues. (The Commission opened a separate proceeding on the remaining issue, the rate at which U S WEST must offer its

[1] Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of title 47, United States Code).

[2] U S WEST Communications, Inc. v. Minnesota Public Utilities Commission et al., Civ. 97-913, slip op. (D. Minn. March 30, 1999).

[3] U S WEST Communications, Inc. v. Minnesota Public Utilities Commission et al., 55 F. Supp.2d 968 (D. Minn. March 30, 1999).

services at wholesale to its competitors.[4])

The following parties filed comments in response to the notice: the Minnesota Department of Commerce (the Department); U S WEST Communications, Inc. (U S WEST); Cady Telemanagement, Inc. (Cady); McLeodUSA Telecommunications Services, Inc. (McLeod) and Ovation Communications of Minnesota, Inc. (Ovation), filing jointly; MCI WorldCom, Inc. (MCI), MCImetro Access Transmission Services LLC (MCI), MFS Intelenet, Inc. (MFS), AT&T Communications of the Midwest, Inc., (AT&T) and AT&T Wireless Services, Inc. (AT&T), filing jointly; and Sprint Communications Company L.P. (Sprint).

On February 8, 2000 the matter came before the Commission.

FINDINGS AND CONCLUSIONS

I. Legal and Factual Context

A. The Telecommunications Act of 1996

The federal Telecommunications Act of 1996 (the Act) is designed to open the nation's telecommunications markets to competition, using three strategies:

> (1) requiring incumbent local exchange carriers to permit new entrants to purchase their services wholesale and resell them to customers;
>
> (2) requiring incumbent local exchange carriers to permit competing providers of local service to interconnect with their networks on competitive terms; and
>
> (3) requiring incumbent local exchange carriers to unbundle the elements of their networks and make them available to competitors on just, reasonable, and nondiscriminatory terms.
>
> 47 U.S.C. § 251(c).

Under the Act, new market entrants (called CLECs, for "competitive local exchange carriers") are to seek agreements on these issues with incumbent local exchange carriers, who are required to negotiate in good faith.[5] Any issues on which they cannot agree may be arbitrated by the state commission at the request of either party. In resolving these issues, the state commission must impose terms consistent with the Act and establish a schedule for the parties to implement those

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[4] In the Matter of a Further Commission Investigation of Avoided Cost Discount for U S WEST Communications, Docket No. P-999/CI-99-776.

[5] 47 U.S.C. §§ 251 (c); 252 (a) (1); 252 (b) (5).

terms.[6]

Negotiated terms, or agreements negotiated in their entirety, must be submitted to the state commission for approval.[7] The parties are free to negotiate terms that are inconsistent with the standards set forth in subsections (b) and (c) of § 251 of the Act, and negotiated terms may be rejected for only three reasons: (1) they discriminate against a telecommunications carrier who is not a party to the agreement; (2) implementing them would be inconsistent with the public interest, convenience, and necessity; (3) they conflict with any valid state law, including any applicable intrastate service quality standards or requirements. [8]

Finally, the Act also requires local exchange carriers to provide interconnection, services, and network elements to any requesting telecommunications carrier on the same terms and conditions found in any state commission-approved agreement to which the local exchange carrier is a party.[9] This right to adopt or "opt in" to existing interconnection agreements applies both to negotiated and arbitrated agreements.

B. The Impact of the Cases at Issue

These cases were groundbreaking proceedings, and in many ways they set the mold for later interconnection agreements. The consolidated case, which involved Minnesota's largest telephone company (U S WEST) and its largest potential competitors (MCI, AT&T, and MFS), presented 94 disputed issues for arbitration and hundreds of negotiated contract terms for review. Carriers entering the market later tended to rely on decisions made in that case, and over 40 of them exercised their § 252 (i) right to adopt *in toto* one of the interconnection agreements approved at the end of the case.

Today's decisions therefore affect not only the named parties, but all parties who have adopted the interconnection agreements that emerged from these cases. For that reason, the Commission served notice of this proceeding on all competitive local exchange carriers and solicited comments on remanded issues from them.

II. The Remanded Issues

The Court has remanded Commission decisions on the following issues for further proceedings:

(1) U S WEST's obligation to combine network elements;

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[6] 47 U.S.C. § 252 (c).

[7] 47 U.S.C. § 252(a) and (e).

[8] 47 U.S.C. § 252(e)(2) and (3).

[9] 47 U.S.C. § 252 (i).

(2) U S WEST's obligation to permit the collocation of remote switch units;

(3) U S WEST's obligation to provide dark fiber, sub-loops, and operations support systems as unbundled network elements;

(4) U S WEST's obligation to offer deregulated and enhanced services at wholesale rates;

(5) U S WEST's obligation to ensure equal treatment of itself and the CLECs by its affiliate, U S WEST Dex;

(6) the Commission's modification of contract terms that were negotiated by the parties.

Each issue will be considered in turn.

III. U S WEST's Obligation to Combine Network Elements

A. The Original Decision

The Court found that in its interconnection agreement with MFS, U S WEST agreed to combine requested network elements in any technically feasible manner requested by MFS. The company did not reach agreement on this issue with AT&T and MCI, however, and those companies took the issue to arbitration. The Commission imposed the following contract language:

> Combination ("Combinations") consist of multiple Elements that are logically related to enable AT&T/MCI to provide service in a geographic area or to a specific customer.[10]
>
> USWC shall offer each Network Element individually and in combination with any other Network Element or Network Elements in order to permit AT&T/MCI to combine such Network Element or Network Elements with another Network Element or Network Elements obtained from USWC or with network components provided by itself or by third parties to provide Telecommunications Services to its customers.[11]

The Court remanded the issue to the Commission, finding that "to the extent the Agreements require U S WEST to combine network elements that it does not ordinarily combine, they

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[10] Attachment 12, AT&T and MCI interconnection agreements.

[11] Part A, Paragraph 37, interconnection agreements.

violate the Act."[12]

A. The Applicable Law

The Commission's original decision requiring U S WEST to combine any network elements that were logically related to one another was based on Federal Communications Commission (FCC) rules 47 C.F.R. § 51.315 (b)-(f), which imposed extensive combination duties on incumbent carriers. These rules were subsequently vacated by the Eighth Circuit Court of Appeals[13] and then partially reinstated in response to the decision of the United States Supreme Court.[14]

The portion of the rules reinstated reads as follows:

> (b) Except upon request, an incumbent LEC shall not separate requested network elements that the incumbent LEC currently combines.
>
> 47 C.F.R. § 315 (b).

The Federal District Court remanded the Commission's original decision for further consideration in light of this language, finding that "to the extent the Agreements require U S WEST to combine network elements that it does not ordinarily combine, they violate the Act."

C. Positions of the Parties

1. U S WEST

U S WEST advocated inserting the following language in the remanded interconnection agreements: "Nothing in this or any other paragraph of this agreement requires U S WEST to recombine network elements that it does not ordinarily combine." The company construed "ordinarily combine" to mean actually combined at present on behalf of the specific customer to whom the CLEC intends to provide the requested combined elements. The company advocated this language as an interim measure, pending Eighth Circuit clarification of its duties in regard to combining network elements.

2. MCI and AT&T

MCI and AT&T argued that the "currently combines" language of the reinstated FCC rule and the "ordinarily combines" language of the District Court's order required U S WEST to honor CLEC requests to combine network elements that it typically combines on its own network to serve its own customers.

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[12] U S WEST Communications, Inc. at 20.

[13] Iowa Utilities Board v. FCC, 120 F.3d 753 (1997).

[14] AT&T Corporation, Inc. v. Iowa Utilities Board, 525 U.S. 366 (1999).

For example, U S WEST routinely combines paired loops to provide its customers with second lines. Similarly, it combines loops with particular switching elements to provide enhanced services such as Call Waiting. MCI and AT&T argued that U S WEST should be required to combine these elements for CLECs as well, because otherwise competition would not materialize.

The companies argued that U S WEST's current narrow construction of its duty to combine network elements was impeding their ability to enter the market. They also claimed that the lack of clarity regarding U S WEST's duty to combine network elements was blocking attempts to develop an effective protocol to test U S WEST's operations support systems' ability to support CLEC operations.

Finally, MCI and AT&T asked the Commission to adopt contract language obligating U S WEST, in the future, to combine for CLECs any network elements it may in the future begin combining for itself.

1. The Department of Commerce

The Department of Commerce interpreted the District Court's language to require U S WEST to combine network elements "if those combinations are currently in existence in combination on U S WEST's network, have been combined in the past, or fall within generally accepted engineering practices for a telephone network." The only combinations the Department would allow the company to refuse to provide would be those requiring a customized solution or those that were technically infeasible.

The Department was concerned that any formulation less stringent than this would encourage evasion of U S WEST's unbundling obligations and inhibit the growth of local competition.

2. McLeod/Ovation

McLeod/Ovation believed that a pending FCC rulemaking on incumbents' duties to combine network elements would provide the best guidance on the issue remanded by the Court. In the meantime, these companies urged the Commission to clarify that U S WEST must provide network elements in a form and manner that permits CLECs to combine them.

3. Cady

Cady focused its comments on the importance of enforcing the prohibition against incumbents separating network elements they normally combine, especially the connected working circuits which form the platforms from which Cady, and many other emerging competitors, serve their customers.

4. Sprint

Sprint stated that its interconnection agreement with U S WEST, too, had been appealed and remanded on the issue of the extent of U S WEST's obligation to combine network elements. That remand is being handled in another docket. Like McLeod/Ovation, Sprint anticipated

further guidance on the issue from the FCC's ongoing rulemaking and thought the issue might be deferred pending its conclusion.

D. Commission Action

First, the Commission will decide in this case only those issues remanded by the Federal District Court. The Commission therefore rejects MCI/AT&T's request to impose language to address future contingencies. Such issues are most effectively dealt with if and when they actually arise in a specific case.

What remains is the District Court's charge to examine the interconnection agreements to determine whether they violate the Act by requiring U S WEST to "combine network elements that it does not ordinarily combine." Since the agreements require U S WEST to combine any network elements that are "logically related," whether or not they are ordinarily combined, they are over-broad. The Commission will amend them to comply with the Act and the Court's order.

The agreements' language must be changed to clarify that (1) U S WEST must combine network elements of the type that it currently combines in its network; and (2) U S WEST is not obligated to combine elements of the type that it does not normally combine in its network.

The Commission rejects U S WEST's claim that its obligation to combine network elements is limited to those elements actually combined at the time of the request on behalf of the specific customer to whom the CLEC intends to provide service. This is an unreasonably narrow reading of the language of the FCC rule and would undermine the purposes of the Act.

The FCC rule at issue reads as follows:

> (b) Except upon request, an incumbent LEC shall not separate requested network elements that the incumbent LEC currently combines.
>
> 47 C.F.R. § 315 (b).

The Federal District Court remanded the Commission's original decision for further consideration, finding that "to the extent the Agreements require U S WEST to combine network elements that it does not *ordinarily* combine, they violate the Act" (emphasis added). The Court, like this Commission, apparently read the "currently combines" language of the FCC rule as referring to the company's normal business practices and ordinary operation of its network, not as referring to the specific network configuration it uses for each of its two million customers.

This is also the only reading that makes sense in light of network realities and the competitive purposes of the Act. For example, to permit U S WEST to refuse to combine paired loops for the provision of second-line service, or to refuse to combine single loops with SS7 switching software for the provision of Call Waiting – both routine combinations occurring ubiquitously throughout the U S WEST network – would be to permit U S WEST to inhibit competition by denying its competitors least-cost access to network element combinations that are so common

that they are akin to single network elements.

Treating such combinations as groups of discrete elements that are not "currently combined" would render meaningless the rules' prohibition against separating "currently combined" network elements and would subvert the purposes of the Act by imposing a severe handicap on new entrants seeking to offer service through a combination of resale and facilities-based service.

Of course, the Commission recognizes that this issue is on appeal and that the disposition ordered today may have to change in response to future judicial determinations.

IV. U S WEST's Obligation to Permit the Collocation of Remote Switch Units

A. The Original Decision

The Commission originally imposed contract language requiring U S WEST to permit the CLECs to place remote switch units (RSUs) on U S WEST property, on grounds that the RSUs were necessary for the CLECs to interconnect with U S WEST's network and to use U S WEST's unbundled network elements. The Commission was relying on FCC rules implementing 47 U.S.C. § 251 (c) (6).

The Court remanded the issue to the Commission, finding that the Supreme Court's rejection, in a different context, of the definition of "necessary" used by the Commission, invalidated it.

A. The Applicable Law

Under the Act incumbent carriers must permit "physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier."[15] The FCC promulgated rules defining "necessary" in this context as "used" or "useful."[16] The Commission found that RSUs were clearly useful for providing interconnection and required collocation on that basis.

In the Iowa Utilities Board case, the United States Supreme Court subsequently invalidated the FCC's definition of "necessary" as applied to unbundled network elements. The definition was not challenged in the context of collocation. The Federal District Court reasoned, however, that the holding applied equally to the use of the definition in the collocation context and remanded the collocation decision for further consideration.

The FCC has subsequently issued another order, however, stating that its definition of "necessary" in the collocation context has not been challenged, stayed, or overturned and

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[15] 47 U.S.C. § 251 (c) (6).

[16] *Implementation of the Local Competition Provision in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd. 15499, 873 (1996), ¶ 580.

remains in full force and effect.[17] The agency is clearly correct that no Court has stricken the collocation rules.

When MCI sought reconsideration of the federal Court's remand of this issue, the Court replied by letter:

> On remand, the Minnesota Public Utilities Commission (MPUC) can consider the FCC Order, as well as this Court's Order, when making its decision concerning the collocation of remote switching units. Therefore, there exists a forum for the FCC Order to be given due consideration.
>
> It would not be beneficial for the Court to reconsider single issues in a piecemeal fashion. Until the MPUC has an opportunity to consider all of the remanded issues, the better practice is for this Court to refrain from considering any of them.

A. Commission Action

The Federal District Court has authorized this Commission to consider the FCC's advanced services Order in conjunction with the Court's remand Order. Taken together, these documents make it clear that the FCC's "used" or "useful" definition stands in the collocation context and that the contract language imposed by the Commission in reliance on that definition should remain in place.

The "used" or "useful" definition as it appears in the collocation context has not been challenged or overturned. The FCC has reexamined the definition in that context and has chosen to retain it.

Even if the definition were patently in violation of the Act – which it is not – neither this Commission nor the Federal District Court could invalidate the FCC rules instituting it. By statute, the right to invalidate FCC rules is reserved to the Federal Courts of Appeals.[18] The "used" and "useful" definition therefore retains the force and effect of law in the collocation context and applies to the interconnection agreements at issue.

The Commission will therefore affirm its earlier arbitration decisions on the collocation of RSUs.

V. U S WEST's Obligation to Provide Dark Fiber, Sub-Loops, and Access to Operations Support Systems as Unbundled Network Elements

A. The Original Decision

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[17] *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, First Report & Order and Further Notice of Rulemaking (Mar. 31, 1999).

[18] 28 U.S.C. § 2342.

The Commission originally imposed contract language requiring U S WEST to provide the CLECs with dark fiber ("unlit," that is, unused, fiber), sub-loops, and access to operations support systems on grounds that these were network elements the company was obligated to unbundle and make available under the Act. The Commission relied on FCC rules adopting an expansive interpretation of the Act's requirement that incumbents grant access to proprietary network elements if they are "necessary" and to non-proprietary network elements if denying access to them would impair the CLEC's ability to provide services it wishes to provide.[19]

The Federal District Court remanded these decisions to the Commission, because the United States Supreme Court invalidated the FCC's interpretation of the Act's unbundling requirements as over-broad.

A. The Applicable Law

The Commission's original decision was based on the FCC's interpretation of the unbundling requirements of 47 U.S.C. § 251 (d) (2); that interpretation was invalidated by the Supreme Court as over-broad and unreasonable. The District Court remanded these three issues for reevaluation in light of the statutory standard, since the portion of the FCC Order interpreting that standard had been invalidated.

Subsequently, however, the FCC duly promulgated new rules narrowing its definition of unbundled network elements and listing the network elements that met both the statutory standard and its new definition.[20] Dark fiber, sub-loops, and operations support systems were all on this list. They are therefore network elements that incumbents must make available to requesting CLECs.

A. Commission Action

The Commission is bound by the FCC's new rules and therefore reaffirms the contract language it imposed in the original Order, requiring U S WEST to provide dark fiber, sub-loops, and operations support systems to CLECs on request.

VI. U S WEST's Obligation to Offer Deregulated and Enhanced Services at Wholesale Rates

A. The Original Decision

The Commission imposed contract language requiring U S WEST to offer for resale at the

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[19] 47 C.F.R. § 15.319.

[20] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, CC Docket No. 96-98 (November 5, 1999).

wholesale discount nearly every service it offers at retail, recognizing the breadth of incumbents' wholesale obligations under the Act. The Federal District Court remanded these provisions to the Commission in light of a later FCC Order clarifying that certain services were not subject to the wholesale discount.

A. The Applicable Law

The Act requires incumbents to "offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers."[21] On February 26, 1998 the FCC adopted rules clarifying that inside wiring, customer premises equipment, and information services are not "telecommunications services" and are therefore not subject to the Act's wholesale discount requirements.[22]

The Federal District Court remanded the issue of enhanced and deregulated services for reexamination in light of the new FCC Order, finding

> The MPUC erred in requiring that inside wiring, CPE [customer premises equipment], and information services be made available for resale at a wholesale discount pursuant to § 251 (c) (4) (A), as that section only requires that "telecommunications services" be made available. However, to the extent deregulated and enhanced services do not include inside wire, CPE, and information services, the MPUC's determination is upheld. Given the broad definition of telecommunications services in the Act and the FCC's decision to only exclude a limited number of services from the meaning of "telecommunications services," it is reasonable to include any deregulated and enhanced services not specifically excluded by the FCC. This matter is remanded to the MPUC for reconsideration consistent with the FCC determination.
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> Memorandum Opinion and Order at 31.

A. Commission Action

The Commission will require the parties to amend the contract language to clarify that U S WEST is not required to offer a wholesale discount on those services specifically enumerated by the Federal District Court – inside wire, CPE, and information services. The Commission will also clarify that "information services" include the following services, which all parties agreed are information services – conferencing service, enhanced fax service, versanet service, and voice messaging service.

The Commission rejects U S WEST's request that it find all "enhanced services" to be

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[21] 47 U.S.C. § 251 (c) (4).

[22] *In re Implementation of the Telecommunications Act of 1996: Telecommunications Carriers Use of Customer Proprietary Network Information and Other Customer Information*, Second Report and Order, CC Docket No. 96-115, ¶ 45 (February 26, 1998).

"information services" not subject to the wholesale discount. As the Federal District Court recognized, the range of services subject to resale at the wholesale discount is extremely broad and includes any deregulated and enhanced services not specifically found by the FCC not to be "telecommunications services."

All services that U S WEST offers to subscribers who are not telecommunications carriers will continue to be subject to the wholesale discount, unless they have been explicitly exempted from the definition of "telecommunications service" by the FCC.

VII. U S WEST's Obligation to Ensure Equal Treatment of Itself and the CLECs by its Affiliate, U S WEST Dex

A. The Original Decision

The Commission originally imposed contract language requiring U S WEST's directory-publishing affiliate, U S WEST Dex, to treat the CLECs the same way it treated U S WEST. The Federal District Court remanded this language, finding that the Commission had exceeded its authority by seeking to regulate U S WEST Dex.

A. The Applicable Law

The Court found that U S WEST Dex is not a local exchange carrier and is therefore beyond the authority of this Commission. It found that the imposition of requirements of equal treatment of U S WEST and CLECs by Dex constituted an attempt to regulate Dex and was beyond the Commission's authority.

A. Commission Action

MCI, AT&T, and U S WEST have agreed to substitute for the language stricken by the Court language negotiated by the parties in South Dakota. The Commission will approve that language. The Dex issue is on appeal and may be revisited, depending upon the outcome of that litigation. The Commission adopts the parties' negotiated language as an interim measure.

VIII. Modification of Negotiated Language

A. The Original Decision

In its original Order the Commission modified certain negotiated terms relating to dark fiber, sub-loop unbundling, and unbundled access for failure to comply with the Act, FCC regulations, or earlier Commission arbitration decisions. The Federal District Court remanded these terms to the Commission, because most of the substantive terms of the Act do not apply to negotiated

agreements.[23]

B. The Applicable Law

Under the Act, negotiated terms and agreements negotiated in their entirety must be submitted to the state commission for approval.[24] The parties are free to negotiate terms "without regard to the standards set forth in subsections (b) and (c) of section 251,"[25] however.

State commissions may reject negotiated agreements for only three reasons: (1) they discriminate against a telecommunications carrier who is not a party to the agreement; (2) implementing them would be inconsistent with the public interest, convenience, and necessity; or (3) they conflict with any valid state law, including any applicable intrastate service quality standards or requirements. [26]

C. Commission Action

The Commission will reinstate the negotiated provisions on dark fiber, sub-loop unbundling, and unbundled access, finding no independent reason at this point to re-impose the original language.

ORDER

1. The Commission hereby amends its original Orders in these dockets to reflect and incorporate the findings, conclusions, and decisions set forth above.

2. Within 20 days of the date of this Order U S WEST shall file contract language implementing the findings, conclusions, and decisions set forth above.

3. Interested persons, including CLECs that have adopted the interconnection agreements at issue under 47 U.S.C. § 252 (i), shall have 10 days from the date of U S WEST's filing to file comments on it.

4. The Commission hereby delegates to the Executive Secretary the authority to determine whether the language filed by U S WEST conforms with the requirements of this Order and to notify the parties of his determination by letter.

5. The Commission hereby delegates to the Executive Secretary the authority to vary the time lines set in this Order.

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[23] 47 U.S.C. § 252 (a) (1).

[24] 47 U.S.C. § 252(a) and (e).

[25] 47 U.S.C. § 252 (a) (1).

[26] 47 U.S.C. § 252(e)(2) and (3).

6. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

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